Supreme Court, U.S.
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No. 01-1106

In the
Supreme Court of the United States

CITY OF PARMA, OHIO,
Petitioner,

v.

CLEVELAND BRANCH, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, and NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONER'S REPLY BRIEF

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Parma's Petition for Certiorari explains how and why the Sixth Circuit's opinion conflicted with this Court's prior rulings on both mootness and an organization's ability to litigate on its members' behalf. Parma further argued that the *NAACP* opinion provides this Court with an opportunity to offer some much-needed guidance to the lower courts over the differences between standing and mootness and to clarify a debate among the circuits about when standing should be measured.

The NAACP raises three arguments in response: (1) Parma has waived its mootness argument because it discussed only voluntary cessation in the courts below; (2) the Sixth Circuit's opinion did not conflict with this Court's binding precedent; and (3) once an association has shown it has standing, neither its own actions nor the actions of its members can moot the case. These arguments are not only without merit, they echo the problems and issues raised by the Sixth Circuit's opinion. That is, both the NAACP and the Sixth Circuit conflate standing and mootness and thereby reveal the fact that this Court must accept certiorari. Without intervention, plaintiffs in this circuit who have standing when the case is filed have met the case-or-controversy requirement for the duration of the litigation. This is not the law.

A. Parma Has Consistently Argued that Because of the Plaintiff's Actions There is No Longer a Live Case or Controversy

In its Brief in Opposition, the NAACP suggests that neither of the lower courts addressed the issue of whether a plaintiff's actions can moot a case. According to the NAACP, that is, Parma "sought dismissal for mootness [in the district court] only because 'Parma's hiring and recruiting program is in compliance with the law.' " The NAACP

further states that the "Court of Appeals below decided the only mootness issue that Parma raise [sic] in the district court, namely that Parma's conduct rendered the case most [sic] and ruled to the contrary." (Br. in Opp'n at 16). Both statements are, quite simply, incorrect.

Throughout this litigation, Parma has argued that the case is moot in part because the NAACP has failed to identify any members with an ongoing interest in the litigation.[1] Under the heading "The NAACP's Claims Are Moot," Parma argued in its Motion for Summary Judgment that Art Tomblin was not a member of the NAACP and that he had "confirmed . . . there was nothing else Parma could do regarding the inquiries about employment." (Mtn. for S.J. at 41). Under the heading, "None of the Named Individuals Retain an Interest in the Litigation," Parma argued in its Brief to the Sixth Circuit that "not a single individual named by the NAACP maintains more than a mere abstract interest in pursuing a position with Parma. This is not sufficient to constitute a continuing case or controversy, making the NAACP's claims moot." Final Br. at 42-43). In that same brief, Parma also pointed out that Tomblin had failed to maintain his membership in the NAACP and that his failure to do so negated the court's authority to hear the case. (Final Br. at 23). In its Petition for Rehearing, Parma reiterated that

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[1] In making these arguments, Parma at times used the language of standing to apply a mootness analysis. In other words, it argued that the NAACP had "lost standing" – *i.e.*, the case had become moot – because it could no longer show the existence of a live case or controversy. (*See* Pet'n at 21-24 for a full discussion of the conflict among the lower courts about when standing should be measured *and compare*, *e.g.*, *Becker v. FEC*, 230 F.3d 381, 386 n.3 (9th Cir. 2000) *with Landmark Land Co., Inc. v. FDIC*, 256 F.3d 1365, 1380 (Fed. Cir. 2001)).

"[c]ases can become moot – as Parma contends in this case – by the acts of a plaintiff as well as the acts of a defendant." (Pet'n for Rehearing at 9). Citing to *City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278 (2001), it further argued that "the acts of Tomblin have sapped this controversy of vitality. Tomblin's lack of a present, concrete interest makes it such that he can gain nothing from the continuing of the litigation." (Pet'n for Rehearing at 9).

The Sixth Circuit's failure to consider whether Tomblin's actions had rendered the case moot thus did not rest on Parma's alleged failure to raise the issue. To the contrary, the Sixth Circuit chose to disregard not only Parma's arguments, but also those raised by the trial court in its Memorandum of Opinion and Order. There, the district court discussed at length the fact that Tomblin (and others) had failed to "maintain[ ] membership in the NAACP throughout this litigation, or even a significant portion of it." (App. at 111a; App. at 111a-117a (setting forth a full discussion of the issue)). The district court further stated that a shared desire to eliminate "racial discrimination *in general* . . . does not give [the NAACP] license to litigate claims on the basis of particular wrongs suffered by individual black persons, unless there is 'something more' connecting that individual person with the NAACP than shared interests and a fleeting membership in the organization." (App. at 114a).

The NAACP's arguments notwithstanding, this case is properly before this Court on all issues raised in Parma's Petition.

B. The Sixth Circuit's Opinion Conflicts With This Court's Prior Rulings

In its second argument, the NAACP contends that the Sixth Circuit's opinion is in accord with this Court's prior rulings. To support this contention, the NAACP cites to several lower-court opinions for the undisputed proposition that a defendant may seek to dismiss a case on the grounds of either voluntary cessation or a change in subsequent events. (Br. in Opp'n at 15). It then cites to *City News* for the same proposition, pointing out that "this Court noted [there] 'the general rule that voluntary cessation of a challenged practice rarely moots a federal case.'" (Br. in Opp'n at 16 (internal citation omitted)). And it suggested that the Sixth Circuit knew a plaintiff could moot a case because the court "used the word 'only' to modify 'subsequent events' and did not limit the actor in those events." (Br. in Opp'n at 15).

In making this argument, however, the NAACP merely highlights the problems in the Sixth Circuit's opinion. Like the Sixth Circuit, the NAACP points out that a case can become moot if a defendant voluntarily ceases to engage in the allegedly wrongful action.[2] Like the Sixth Circuit, the NAACP concedes that the actions of a party other than the defendant can moot a case. And like the Sixth Circuit, the NAACP ignores the fact that the plaintiff can be that other party – *i.e.*, that a plaintiff can render a case moot if he or she loses a cognizable interest in the outcome of the litigation. In other words, even as the NAACP and the Sixth Circuit

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[2] For instance, the district court held this case was moot because Parma had eliminated the residency requirement at issue, had engaged in "affirmative – and active – efforts to recruit individuals, including minorities," and had thus "given the NAACP what they sought to achieve by this action." (App. at 89a).

acknowledge that a plaintiff's actions can moot a case, they concentrate solely on Parma. Even as they point out that a wide variety of subsequent events can moot a case, they ignore the fact that Tomblin is no longer a member of the NAACP, that he "no longer alleges an injury that can be redressed by a favorable judicial decision," and that no identifiable member of the NAACP will benefit from an injunction. (App. at 60a (dissent)). To say so much as lip service is given to the actions of the NAACP and its one-time "members" would be an overstatement.

Both Parma and the Sixth Circuit thus conducted a mootness analysis that is in direct conflict with this Court's prior rulings. For instance, this Court stated clearly in *City News* that a case becomes moot when the plaintiff "sap[s] the controversy of vitality" and thereby loses "a legally cognizable interest in [its] outcome." 121 S. Ct. at 747 & n.1. The *Arizonans for Official English* Court stated with equal clarity that a case will become moot if the plaintiff "lack[s] a still vital claim for relief." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997). In short, nothing in the Constitution or this Court's prior opinions "justif[ies] a departure from the fundamental requirement that a plaintiff must have a continuing interest in the ongoing litigation in order for this court to exercise the limited jurisdiction it is granted by the Constitution." (App. at 60a, *citing Iron Arrow Honor Soc'y v. Heckler*, 464 U.S. 67, 70 (1983)). To rule otherwise – as did the Sixth Circuit in this case – is to contravene the case-and-controversy requirement set forth in Article III of the Constitution. *See Spencer v. Kemna*, 523 U.S. 1, 7 (1998) (stating that the "case-or-controversy requirement subsists through all stages of federal judicial proceedings).

C. An Association With Standing to Litigate On Behalf of Its Members is Not Immune from a Mootness Analysis.

The NAACP's final – and apparently alternative – argument rests on *United Food and Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544 (1996). According to the NAACP, that case stands for the proposition that "[o]nce an association has established standing by showing that it had one or more members who were injured in fact, and that the interests . . . the organization seeks to protect are germane to the organization's purpose, the 'association's litigators will be in a position to serve as the defendant's natural adversary.'" (Br. in Opp'n at 18 (quoting *id.* at 555-56)). As such, it concludes, Article III does not "require[ ] a continuing personal stake in the litigation by the member(s) identified as having been injured."[3] (Br. in Opp'n at 18).

In fact, the NAACP misstates the holding in *Brown Group*. That case holds only that the third prong of the *Hunt* test for associational standing is prudential rather than constitutional and may thus be abrogated. *Id.* at 556, 558. If Congress so chooses, in other words, an association may obtain *standing* to litigate on behalf of its members even if it seeks not injunctive relief, but damages. This Court did not suggest that either the constitutional or the prudential requirements for standing could somehow be equated with the

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[3] The NAACP's reliance on this language (that "Article III does not require a continuing personal stake in the litigation"), from this case, from this Court, after arguing that the Sixth Circuit's opinion does not conflict with this Court's prior rulings illustrates the confusion that exists. (*See, e.g.*, *City News*, 121 S. Ct. at 747 & n.1; *Spencer*, 523 U.S. at 7; *Arizonans*, 520 U.S. at 67.)

constitutional requirements for mootness. The Court did not hold that once an association has achieved standing neither its own actions nor the actions of its members could moot a case. And this Court did not hold that an organization could continue to litigate on behalf of its members even if none of those members had an ongoing interest in the litigation. To the contrary, it did not discuss mootness at all.

The NAACP appears to rely not on the actual holding in *Brown Group*, but on a series of faulty assumptions. For instance, it assumes that if a plaintiff has managed to meet all of the requirements for standing, that plaintiff's "task in avoiding mootness is over." (App. at 52a (dissent)). It assumes that because one element of associational standing is prudential, then the case-or-controversy requirement must be prudential for associations as well. And it assumes that because an organization at one time represented the interests of its members, it must necessarily do so now. As Parma discussed above and at length in its Petition, such assumptions are in direct conflict with this Court's prior rulings. *See, e.g.*, *City News* 121 S. Ct. at 747 & n.1; *Spencer*, 523 U.S. at 7; *Arizonans*, 520 U.S. at 67.

Unfortunately, however, such assumptions are not in conflict with the Sixth Circuit's ruling in this case as it presently stands. To the contrary, this case only reinforced such flawed assumptions by "conflate[ing] standing and mootness," (App. at 50a), by concentrating solely on Parma's actions, and by failing to determine whether a live case-or-controversy remains before the court. In doing so, the Sixth Circuit has suddenly allowed associations to litigate "on behalf of" individuals with no interest in the litigation and with so little interest in the association that they have dropped their membership. At the same time, this case has improperly broadened the limited jurisdiction granted to the federal courts

by the United States Constitution and invited both forum-shopping and a flood of essentially victimless lawsuits seeking relief benefiting no known, named individual. For these reasons alone, this Court's review is both warranted and necessary.

D. Conclusion

For the reasons set forth above and in its Petition for Certiorari, the City of Parma, Ohio respectfully requests that its Petition be granted.

Respectfully submitted,

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